Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

v.

MARCUS WEST,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Illinois Appellate Court's holdings that, because of their content, testimonial hearsay statements include (1) statements made during the course of an on-going 911 emergency call and (2) statements of fault or identity, made while seeking emergency medical treatment, conflict with Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266 (2006).

2. Whether the Court should grant the petition, vacate the judgment, and remand this case because there is a reasonable probability the state appellate court would reverse these holdings if given the opportunity to consider the case in light of Davis, which was issued after the appellate court's opinion.

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PETITION FOR A WRIT OF CERTIORARI

The State of Illinois respectfully petitions for a writ of certiorari to the Appellate Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois (App.1-21) is reported at 355 Ill. App. 3d 28, 823 N.E.2d 82 (2005). The order of the Supreme Court of Illinois denying the State's timely petition for leave to appeal (App. 22) is reported at 224 Ill.2d 592, 871 N.E.2d 61 (2007). The order of the Supreme Court of Illinois (App. 23) denying the State's timely motion to reconsider the denial of the petition for leave to appeal or, in the alternative, to enter a supervisory order remanding the matter to the Appellate Court for reconsideration in light of Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266 (2006) and/or People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007) is unreported but is reprinted in the Appendix to this petition. (App. 24-33).

STATEMENT OF JURISDICTION

The Appellate Court of Illinois entered judgment on January 5, 2005. The State of Illinois filed a timely petition for leave to appeal, which the Supreme Court of Illinois denied on May 31, 2007. The State of Illinois filed a timely motion to reconsider the denial of the petition for leave to appeal or, in the alterna-

tive, to enter a supervisory order remanding the matter to the Appellate Court for reconsideration in light of Davis v. Washington and/or People v. Stechly, which the Supreme Court of Illinois denied on July 12, 2007. The decision of the Appellate Court was based on the Sixth and Fourteenth Amendments; therefore, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.

U.S. Const., amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

U.S. Const., amend. XIV.

STATEMENT OF THE CASE

1. After a jury trial, Respondent, Marcus West, was convicted of five counts of aggravated criminal sexual assault and one count each of aggravated vehicular hijacking, armed robbery, and kidnapping. Respondent was sentenced to three consecutive terms of

thirty years' imprisonment, to run concurrently with terms of thirty years and seven years. App. 1. The Appellate Court of Illinois reversed Respondent's convictions and remanded the cause for a new trial, holding that the admission of certain hearsay statements made during a 911 call and to emergency medical personnel violated the Confrontation Clause of the Sixth Amendment. App. 13, 17-18, 21.

2. On the evening of March 19, 1998, Respondent and his co-defendant, Marvin Yates, orchestrated the kidnapping, aggravated vehicular hijacking and brutal gang rape of a female cab driver, M.M. In the midst of the ordeal, M.M. escaped and rang the doorbell of Dorothy Jackson, leaving Respondent and co-defendant in possession of her car, jewelry, and purse, which contained her driver's license. During the assault, the men took M.M.'s driver's license and told her they "would kill her and her family if she told anyone what happened." App. 2-4. Crying, bleeding and her body skinned from being dragged by the car during the escape (R. DD31-37; TR. 10-18), M.M. cried, "Help me, I've been raped." Jackson opened the door, brought the victim into her home, and called 911. Prior to trial, the trial court ruled the 911 call admissible pursuant to Illinois' common law spontaneous declaration hearsay exception. Thus, a tape recording and transcript of the 911 call were introduced during the trial. App. 2, 3.

3. Also introduced at trial, pursuant to the spontaneous declaration exception, were several other hearsay statements made by the victim to Chicago police officers. The victim made one statement at the scene, still "balled up like a little child," to responding

Officer LaSandra Harrel, another statement to Officer Harrel at the hospital, and statements to Officer Patricia Kane and Detective Daniel McInerney, also at the hospital. App. 2, 4-6.

4. In the meantime, after the 911 call and while the victim was receiving medical treatment in the emergency room, defendant was arrested, along with co-defendant Yates, still driving the victim's cab and in possession of her property. App. 5. When Officer Kane spoke with the victim at the hospital and informed her of the arrest, M.M. became hysterical, explaining that there had been three offenders, not just two, and that they had taken the victim's driver's license and threatened to kill the victim and the victim's family. R.DD38-39; App. 4, 6.

5. At the hospital, the victim also made statements to an emergency room treating nurse, Susanna Sibug, and an emergency room treating physician, Dr. Andrew Labrador, which were recounted by both witnesses at trial. App. 5. Prior to trial, after a hearing on the matter, the trial court ruled these statements admissible pursuant to Illinois' medical treatment exception to the hearsay rule (725 ILCS 5/115-13 (West 2002)). App. 2.

Proceedings Below

6. The Illinois Appellate Court reversed, finding, *inter alia*, that certain statements within the 911 call were "testimonial," and therefore, violative of the Sixth Amendment under Crawford v. Washington, 541 U.S. 36 (2004), and certain statements within the 911 call were not. App. 17-18. The Appellate Court found that the statements during the 911 call, by and large,

were "nontestimonial" in that they were made "for the purpose of requesting medical and police assistance." App. 17. However, the Appellate Court excepted certain statements within the 911 call from this classification, finding that statements made describing the car, the direction in which the assailants fled and the items of personal property taken were "testimonial" because "[t]hese statements were made in response to questions posed by the dispatcher for the stated purpose of involving the police." App. 17.

The Appellate Court similarly analyzed the statements made by the victim during the course of emergency medical treatment at the emergency room. That Court found that statements "regarding the nature of the alleged attack, and the cause of her symptoms and pain" were "nontestimonial." App. 13. However, those statements "which identify the defendant as her assailant are testimonial in nature." App. 13. Drawing from the reasoning of one of its earlier cases, In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (2004), the Appellate Court announced that, "statements * * * concerning fault or identity * * * 'implicate the core concerns protected by the confrontation clause'" and are, therefore, "testimonial" under that Clause. App. 13.

Timing of Appellate Court Decision

7. The decision of the Appellate Court relies upon this Court's decision in Crawford v. Washington, 541 U.S. 36 (2004). While the People's Petition for Leave to Appeal ("PLA") this decision to the Illinois Supreme Court was pending, this Court decided Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266 (2006).

Thus, when the Illinois Supreme Court denied the State's PLA, without comment, the State sought to have the Illinois Supreme Court reconsider its decision in light of Davis and/or People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007), a recent decision of the Illinois Supreme Court relying on Davis for Sixth Amendment Confrontation Clause analysis. Alternatively, the State requested the Illinois Supreme Court to remand the matter to the Appellate Court for reconsideration in light of this intervening precedent. The Illinois Supreme Court denied this motion without comment.

REASONS FOR GRANTING THE PETITION

Crawford v. Washington, 541 U.S. 36 (2004), effected a sea-change in Sixth Amendment Confrontation Clause jurisprudence and the analytical framework for determining the admissibility of hearsay statements. Crawford established that the "testimonial" nature of the hearsay statement is now the critical gauge for the application of the Confrontation Clause. *Id.* at 51. Because the station- house interrogation at issue in Crawford "qualified under any definition," *Id.* at 52, the Court left "for another day any effort to spell out a comprehensive definition" of "testimonial." *Id.* at 68. Courts throughout the nation, including the Illinois Appellate Court herein, developed their own tests to ascertain whether a statement was "testimonial" under Crawford.

Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266 (2006) fleshed out the definition of "testimonial" in the context of a 911 call and a scene investigation by

responding police officers: Davis undertook "to determine more precisely which police interrogations produce testimony." Davis, 126 S.Ct. at 2273.

Under Davis, the existence or subsistence of an "ongoing emergency" is the organizing principle, giving rise to the objective circumstances by which the statements are judged. It is context, not content, that makes a statement "testimonial" under the Confrontation Clause. *Id.* at 2273-74, 2276-77.

The Illinois Appellate Court, however, did not have the benefit of this Court's decision in Davis when it scrutinized the hearsay statements in Respondent's case. Crawford was in place, but Davis was not yet decided. The Appellate Court held that certain statements during the 911 call and that certain statements made to the treating nurse and doctor during emergency medical treatment were "testimonial" on the basis of a test the state court established after Crawford but before Davis. Given the teaching of Davis, there is more than a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," which redetermination may well be determinative of the outcome of the case. Lawrence v. Chater, 516 U.S. 163, 167 (1996). Thus, the appropriate disposition would be for this Court to grant the petition, vacate the judgment of the Illinois Appellate Court and remand the case to that court for further consideration in light of this Court's intervening precedent of Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266 (2006).

A. THE ILLINOIS APPELLATE COURT'S DETERMINATION THAT CERTAIN STATEMENTS MADE DURING A 911 CALL WERE "TESTIMONIAL" EMPLOYED A TEST THAT CONFLICTS WITH THIS COURT'S INTERVENING DECISION IN DAVIS v. WASHINGTON.

In Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266 (2006), this Court set forth the following test by which to judge the "testimonial" or "nontestimonial" nature of statements produced from police interrogation, including a 911 call, under the Sixth Amendment Confrontation Clause:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

126 S.Ct. at 2273-74. This Court reiterated that, "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 2274, n. 1.

Expounding on this principle, this Court explained that, in Crawford, 541 U.S. 36 (2004), wherein the stationhouse interrogation was judged to produce "testimonial" statements, "we had immediately in

mind * * * interrogations solely directed at establishing the facts of a past crime, in order to identify (or to provide evidence to convict) the perpetrator." Davis, 126 S.Ct. at 2276. In contrast, a true 911 call is generally "nontestimonial" in that it is "ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Id.* Thus, the overriding objective dividing point for classification of a statement made during a 911 call as "testimonial" or "nontestimonial" is contextual and, more specifically, temporal. See, *Id.* at 2277.

One must ask whether the declarant was "speaking about events *as they were actually happening*" or, rather, was "describ[ing] past events." (Emphasis in original; Citation omitted) *Id.* Was the declarant "facing an ongoing emergency" such that the 911 call was "a call for help?" *Id.* Moreover, objectively viewing the nature of what was asked and answered, the elicited statements of a true 911 call are "necessary to *resolve* the present emergency, rather than simply to learn (as in Crawford) what had happened in the past." *Id.* (Emphasis in original). Finally, the level of formality of the interview is also an indicator of its "testimonial" or "nontestimonial" nature: was the exchange closer to the stationhouse interrogation in Crawford or was it conducted "in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe?" *Id.* at 2277.

A multitude of lower courts, including the Illinois Appellate Court, understood Crawford to mean that, if a police interrogation of any type took place, the resulting statements were necessarily "testimonial."

Davis corrected that misimpression, teaching that not all police interrogations produced "testimonial" statements and that it is the objective circumstances of the exchange which govern the analysis. If the emergency is "ongoing," then the declarant is making "a cry for help" and is not "acting as a *witness*" such that her 911 statements are not "a weaker substitute for live testimony." *Id.* at 2277 (Emphasis in original).

The Appellate Court, under the mistaken impression that its sole inquiry was whether the 911 dispatcher was conducting an "interrogation," classified certain of the victim's statements as "testimonial" on the basis of the statements' content. In essence, the state court sorted out the statements within the 911 call based on whether the subject matter related to medical or police assistance or "involv[ed] the police" and, thus, "produce[d] evidence." App. 14-15. The Illinois Appellate Court then determined that the statements which "described [the victim's] vehicle, the direction in which her assailants fled, and the items of personal properly they took are testimonial." App. 15.

Had the Illinois Appellate Court been guided by Davis, this result would have been different. Under Davis, the pivotal question is not substantive content but temporal context: is the emergency on-going? If it is, then the elicited statements "were necessary to *resolve* the present emergeny" and this "is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon." Davis, 126 S.Ct. at 2276.

Clearly, the entirety of the 911 call in this case was a classic "cry for help." The emergency was ongoing *at least* until the offenders were arrested and the victim was made aware of this information. The arrest took place after the entire 911 call came to an end. Until the arrest of defendant and his co-defendant, the victim knew that at least two (and up to four) offenders were still at large with her car, her purse and, most importantly, her driver's license. They had made an unequivocal threat to the victim when they took her license that they "would kill her and her family if she told anyone what happened" (App. 4) and this emergency was very much "on-going" until all of the offenders had been apprehended.

Thus, this is the prototypical case warranting disposition in the form of granting the petition for certiorari, vacating the judgment below, and remanding the case to the Illinois Appellate Court for further proceedings in light of Davis (GVR). Given the procedural history of this case, Davis indisputably qualifies as intervening precedent of this Court that "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." Lawrence v. Chater, 516 U.S. 163, 167 (1996) (*per curiam*). A reexamination of its determination regarding the "testimonial" nature of the statements within the 911 call under the guidance of the test laid out in Davis is certainly in order and most likely outcome-determinative. *Id.*; See, *e.g.*, United States v. Cadieux, 2007 U.S. App. Lexis 19821 (1st Cir. 2007) (statements made during a 911 call were "nontestimonial" under Davis); United States v.

Arnold, 486 F.3d 177 (6th Cir. 2007) (same); Connecticut v. Torelli, 103 Conn. App. 646, ___ A.2d ___ (Conn. App. 2007) (same); Massachusetts v. Galicia, 447 Mass. 737, 857 N.E.2d 463 (2006) (same); Missouri v. Kemp, 212 S.W.3d 135 (S. Ct. 2007) (same); Walker v. Florida, 2007 Fla. App. Lexis 13390 (2007) (same); Collins v. Indiana, 873 N.E.2d 149 (Ind. App. 2007) (same).

As in Stutson v. United States, "[T]his exceptional combination of circumstances presents ample justification for a GVR order." 516 U.S. 193, 195 (1996) (*per curiam*); see Guste v. Jackson, 429 U.S. 399 (1977) (*per curiam*); Busey v. District of Columbia, 319 U.S. 579 (1943) (*per curiam*); State Tax Commission v. Van Cott, 306 U.S. 511 (1939). This Court has issued GVR orders in several cases presenting the identical circumstances of this case and the intervening decision in Davis. See Anderson v. State, 111 P.3d 350 (Alaska App. 2005), *cert. granted, vacated and remanded*, 126 S.Ct. 2983 (2006); People v. Castellanos, 2005 Cal. Lexis 13231 (Cal. App. 2005), *cert. granted, vacated and remanded*, 126 S.Ct. 2965 (2006); People v. Thomas, 2005 Cal. Lexis 13012 (2005), *cert. granted, vacated and remanded*, 126 S.Ct. 2983 (2006); Minnesota v. Warsame, 701 N.W.2d 305 (Minn. App. 2005), *cert. granted, vacated and remanded*, 126 S.Ct. 2983 (2006); Minnesota v. Wright, 701 N.W.2d 802 (Minn. 2005), *cert. granted, vacated and remanded*, 126 S.Ct. 2979 (2006); North Carolina v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22 (N.C. App. 2004), *cert. granted, vacated and remanded*, 126 S.Ct. 2977 (2006); North Carolina v. Lewis, 360 N.C. 1, 619 S.E.2d 830 (N.C. 2005), *cert. granted, vacated*

and remanded, 126 S.Ct. 2983 (2006); United States v. Billingslea, 144 Fed. Appx. 98 (11th Cir. 2005), *cert. granted, vacated and remanded*, 126 S.Ct. 2980 (2006). In this case, too, "the equities clearly favor a GVR order." Stutson, 516 U.S. at 196. Thus, a GVR is the appropriate disposition in this case.

B. THE ILLINOIS APPELLATE COURT'S DETERMINATION THAT STATEMENTS CONCERNING FAULT OR IDENTITY MADE BY THE VICTIM DURING EMERGENCY MEDICAL TREATMENT WERE "TESTIMONIAL" EMPLOYED A TEST THAT CONFLICTS WITH THIS COURT'S INTERVENING DECISION IN DAVIS v. WASHINGTON.

The determination of the Illinois Appellate Court with respect to the statements made by the victim during emergency medical treatment to the treating nurse and treating doctor suffers from the same infirmities discussed above in the context of the 911 call. Drawing upon the reasoning of its own earlier precedent, the Illinois Appellate Court assessed the "testimonial" nature of the statements under the Sixth Amendment Confrontation Clause on the basis of content, concluding that statements "concerning fault or identity * * * 'implicate the core concerns protected by the confrontation clause.' In re T.T., 351 Ill.App.3d [976,] 993[, 815 N.E.2d 789 (2004)]." App. 13.

As in the 911 context, the Illinois Appellate Court's test was fashioned solely on the basis of Crawford v. Washington, 541 U.S. 36 (2004), without the guidance of this Court's intervening precedent, Davis v. Wash-

ington, 126 S.Ct. 2266 (2006). There is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." Lawrence v. Chater, 516 U.S. 163, 167 (1996) (*per curiam*). Further, application of Davis upon reconsideration by the Illinois Appellate Court would be outcome-determinative (*Id.*; See, *e.g.*, People v. Cage, 40 Cal. 4th 965, 155 P.3d 205 (Cal. 2007) (statements made for the purpose of medical treatment to emergency medical personnel were not "testimonial" when judged by the Davis standard); Ohio v. Stahl, 111 Ohio St. 3d 186, 855 N.E.2d 834 (Ohio 2006) (same)) and would also be justified by the equities (Stutson v. United States, 516 U.S. 193, 195-196 (1996) (*per curiam*)) with respect to this issue, as well. Thus, "this exceptional combination of circumstances presents ample justification for a GVR order" (*Id.* at 196), mandating reconsideration by the Illinois Appellate Court of the "testimonial" nature of the statements made by the victim during the course of and for the purpose of emergency medical treatment.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Illinois Appellate Court should be vacated, and the case should be remanded for further consideration in light of this Court's decision in Davis v. Washington, 547 U.S. ___, 126 S.Ct. 2266 (2006).

Respectfully submitted,

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APPENDIX

No. 1-02-2358

THIRD DIVISION
FILED: January 5, 2005

PEOPLE OF THE STATE OF ILLINOIS,	)
Plaintiff-Appellee,	) Appeal from the Circuit Court of Cook County
v.	)
MARCUS WEST,	) No. 98 CR 10120
Defendant-Appellant.	) Honorable Stuart E. Palmer Judge Presiding.

JUSTICE HOFFMAN delivered the opinion of the court:

Following a jury trial, the defendant, Marcus West, was convicted of five counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2002)), and one count each of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3) (West 2002)), armed robbery (720 ILCS 5/18-2(a) (West 2002)), and kidnaping (720 ILCS 5/10-1(a)(1) (West 2002)). He was sentenced to consecutive terms of 30 years' imprisonment on three of the aggravated criminal sexual assault convictions and the armed robbery conviction, concurrent terms of 30 years' imprisonment for the remaining aggravated criminal sexual assault and aggravated vehicular hijacking convictions, and a concurrent term of 7 years' imprisonment for the kidnaping conviction. On appeal, the defendant argues that the admission at trial of numerous out-of-court testimonial statements made by the victim violated his sixth amendment right of confrontation (U.S. Const., amend. VI), and that the trial court erred in

admitting certain testimony at his sentencing hearing. Alternatively, the defendant argues that several of the victim's statements were improperly admitted under the spontaneous declaration exception to the hearsay rule. For the reasons which follow, we reverse and remand for a new trial.

In the evening of March 19, 1998, the victim, M.M., was operating her cab when two male passengers, one of whom was armed with a gun, kidnaped, robbed, and sexually assaulted her. The defendant was arrested while driving M.M.'s cab shortly thereafter and charged, along with co-defendant Marvin Yates, with numerous counts of aggravated criminal sexual assault, aggravated kidnaping, kidnaping, attempted murder, armed robbery and aggravated vehicular hijacking.

Prior to trial, the State filed a motion *in limine* seeking a ruling on the admissibility of several statements made by M.M. to: Dorothy Jackson, a woman from whom she received help immediately following the assault; a treating nurse and doctor; and three police officers. The motion further stated that M.M. was unavailable to testify at trial because she was murdered on May 14, 1998. The State also sought to introduce a tape recording of the 911 call made after the assault. The defendant responded with a motion *in limine* which sought to exclude M.M.'s out-of-court statements as hearsay. Following a hearing, the trial court found the statements admissible under the spontaneous declaration and statement to medical personal for purposes of medical treatment (725 ILCS 5/115-13 (West 2002)) exceptions to the hearsay rule.

The matter then proceeded to trial, during which the State presented the following evidence. Jackson testified that, on March 19, 1998, she was in her house at 7058 South Throop Street when she heard her doorbell ring. As she approached the front door, Jackson heard a woman cry out, "Help me, I've been raped." Jackson opened the door, helped the woman inside and, as she was trying to calm her, asked what happened. The woman replied that she was raped by two, possibly six men, in two separate locations, and that the men had taken her vehicle, driver's license, purse, and jewelry. The woman also told Jackson that she was a cab driver, and gave a description of her vehicle.

Jackson then placed a call to a 911 dispatcher and relayed the information she had just learned. Jackson stated that, during the call, she would ask the woman questions posed by the dispatcher, and provide the dispatcher with the woman's answers.

The State then introduced into evidence a tape recording and transcript of the 911 call. During the call, which was played for the jury, the dispatcher is heard posing numerous questions to Jackson. These questions began with inquiries into what was wrong, whether M.M. was in need of an ambulance, where she was located, and what her age was. The dispatcher then asked a series of questions relating to M.M.'s vehicle and the direction in which the assailants went "in order to get the police over there to help." M.M. can be heard on the recording answering some of the dispatcher's questions and stating that her assailants took several items of her personal property.

Chicago police officer LaSandra Harrell testified that, on March 19, 1998, she responded to a "call for help" at 7058 South Throop Street where she found M.M. "balled up like a little child." The officer approached M.M. who told her that she had been raped at gun point several times by four men. She also told Officer Harrell that the main assailant was wearing green pants, and that he had taken her red 1993 Pontiac Grand Am. The officer relayed this information to her partner who immediately sent a message over the police radio containing the information provided by M.M.

Officer Harrell stated that she followed M.M. to the hospital where she began to question her about the incident. In response to the officer's questions, M.M. stated that she received instructions to pick up two men and drive them to the 5700 block of South Maplewood Avenue. After completing the drive and requesting her fare, one of the men (first offender), who was wearing green pants, put a gun to the base of her neck and took her coin purse, necklace, watch, and earrings. The first offender then forced her to perform oral sex on him and the other man (second offender) in the vehicle before he drove to a store where the second offender purchased a box of condoms. M.M. told the officer that she was then driven to an abandoned garage where both men had vaginal sex with her. The first offender then drove to another garage where the two men, and another man who had been picked up along the way, had vaginal sex with her. Following this assault, the men took her driver's license, and the first offender threatened that he would kill her and her family if she told anyone what happened. She was eventually able to escape and run to a house for help.

Chicago police officer Kevin White testified that, on March 19, 1998, at approximately 11:24 p.m., he observed a red Pontiac Grand Am illegally pass his undercover vehicle and drive through a red light. The officer pursued the vehicle for several blocks, eventually arresting the driver of the vehicle after engaging in a foot chase. The driver, who Officer White identified in court as the defendant, was wearing green pants and a white t-shirt that appeared to have blood stains on it. The Grand Am was subsequently identified as being registered to M.M., and a custodial search of the defendant revealed a watch, necklace, and one earring.

Susanna Sibug, an emergency room nurse, testified that she spoke to M.M. in the hospital shortly before midnight on March 19, 1998. Sibug stated that M.M. told her that she had responded to a call to pick up some passengers who had specifically requested a female cab driver. M.M. told Sibug that, after driving the passengers to their destination, they began to hit her and threaten her with a gun. M.M. then recounted for Sibug the ways in which she was physically and sexually assaulted and described her assailants as black males in their teens or early twenties.

Dr. Andrew Labrador testified that he was M.M.'s emergency room physician. The doctor stated that he initiated his examination of M.M. by asking her what happened. She responded with a description of how she had obtained her injuries and how she had been sexually assaulted. Dr. Labrador performed a physical examination of M.M. and, with Sibug's assistance, prepared a sexual assault kit. The doctor testified that his examination revealed numerous abrasions to M.M.'s face, right hand, hips, knees, back, and chest.

The State also presented the testimony of Officer Patricia Kane and Detective Daniel McInerney. The majority of their testimony concerned the various statements M.M. provided in response to their independent questioning of her at the hospital. These statements included descriptions of the defendant and the nature of his actions, and were substantially similar, although more detailed, than the information M.M. provided Officer Harrell at the hospital.

Finally, the State introduced physical and genetic evidence obtained from M.M., her vehicle, the defendant, and the two areas where the assaults took place. This evidence showed that DNA profiles from M.M.'s vaginal swab and the semen stains found on her panties and leggings matched the DNA profile of the defendant. Further, a DNA profile taken from a blood sample found on the shirt the defendant was wearing at the time of his arrest matched M.M.'s DNA profile.

Following deliberations, the jury returned guilty verdicts on five counts of aggravated criminal sexual assault, and one count each of aggravated vehicular hijacking, armed robbery, and kidnaping. The court entered judgment on the verdicts and continued the matter for sentencing. At the sentencing hearing, the State presented in aggravation evidence of the defendant's prior bad acts. These included statements by a correctional officer who had investigated the defendant's alleged involvement in two fights while he was awaiting trial and testimony by a Chicago police detective who had investigated the defendant's alleged involvement in the assault of a 13 -year-old girl in 1995. Neither the officer nor the detective had witnessed the events to which they testified. Following arguments,

the court sentenced the defendant to consecutive terms of 30 years' imprisonment on three of the aggravated criminal sexual assault convictions and the armed robbery conviction, concurrent terms of 30 years' imprisonment for the remaining aggravated criminal sexual assault and aggravated vehicular hijacking convictions, and a concurrent term of 7 years' imprisonment for the kidnaping conviction. The defendant filed motions for a new trial and reconsideration of his sentence. Both motions were denied, and this appeal followed.

Citing Crawford v. Washington, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (2004), the defendant contends that M.M.'s statements to Jackson, the 911 operator, Officers Harrell and Kane, Detective McInerney, Sibug, and Dr. Labrador constitute testimonial evidence. He argues that their admission at trial, in the absence of an opportunity to cross-examine M.M., violated his constitutional right of confrontation.

The sixth amendment's confrontation clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amend. VI.Until recently, an unavailable witness's out-of-court statement could satisfy sixth amendment scrutiny, and be admitted at trial, so long as it had an adequate indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 66, 65 L.Ed.2d 597, 100 S.Ct. 2531 (1980). In Crawford, the Supreme Court abandoned this reliability framework in relation to testimonial statements. In its place, the Court held that the confrontation clause bars out-of-court testimonial statements unless the declarant is unavailable to testify and the defendant had a prior

opportunity to cross-examine the declarant, regardless of whether the court finds adequate indicia of reliability. Crawford, 541 U.S. at 68, 124 S.Ct. at 1374. Although the Crawford Court left "for another day any effort to spell out a comprehensive definition of 'testimonial'" (Crawford, 541 U.S. at 68, 124 S.Ct. at 1374), it did provide several examples of what it termed "[v]arious formulations of [the] core class of 'testimonial' statements" (Crawford, 541 U.S. at 50, 124 S.Ct. at 1364). These include: (1) "'*ex parte* in-court testimony or its functional equivalent that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"; (2) "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions'"; (3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'"; and (4) "statements taken by police officers in the course of interrogations." Crawford, 541 U.S. at 50, 124 S.Ct. at 1364.

The defendant first contends that M.M.'s statements to the three officers at the hospital are testimonial in nature because they were taken for law enforcement purposes, and that they should not have been admitted at his trial. We agree.

Although Crawford failed to precisely define testimonial evidence, the Court was clear in at least one respect: statements taken by police officers in the course of an interrogation are considered testimonial "under

even a narrow standard." Crawford, 541 U.S. at 50, 124 S.Ct. at 1364. Moreover, according to Crawford, the term "interrogation" is to be viewed in a colloquial, rather than a technical sense. Crawford, 541 U.S. at 54, 124 S.Ct. at 1366 n.4.

In this case, at the time M.M. was questioned at the hospital, the defendant was already in custody and the officers possessed some knowledge of his alleged involvement in the assault. Their questioning of M.M. was conducted for the purpose of further investigating the defendant's involvement and to gather evidence for use in a criminal prosecution. Accordingly, the officers asked specific, purposeful questions and were in turn provided with detailed descriptions of the events that transpired and the defendant's involvement These investigative, evidence-producing actions bore statements which, if used to convict the defendant, would implicate the central concerns underlying the confrontation clause. Crawford, 541 U.S. at 52-53, 124 S.Ct. at 1365. Therefore, we find that the statements M.M. provided at the hospital to Officers Harrell and Kane and Detective McInerney are testimonial in nature. Because M.M. was unavailable to testify at trial and the defendant did not have a prior opportunity to cross-examine her, these statements were inadmissible.

We turn now to the statement M.M. provided to Officer Harrell at Jackson's house. Unlike the statements elicited by the officers at the hospital, the statement at issue here was obtained in response to the officer's preliminary task of attending to the medical concerns of a victim shortly after the commission of an offense. We believe that this distinction is controlling in

our determination of whether the statement is testimonial in nature.

Although there has been no Illinois case on point, we are persuaded by the reasoning of the court in People v. Kilday, 20 Cal. Rptr. 3d 161, 123 Cal. App. 4th 406 (Cal. Ct. App. 2004). In Kilday, the defendant raised Crawford challenges to three separate statements the victim made to several police officers, each of which described the nature of an alleged assault and implicated the defendant as the assailant. Two of these statements, which were made after the victim's safety and medical concerns were attended to and for the purpose of obtaining evidence in anticipation of a potential criminal prosecution, were found to constitute testimonial evidence. However, a third statement, which was provided at the scene of the alleged crime to two responding officers upon their arrival, was found not to be testimonial in nature. In reaching this decision, the Kilday court first noted that when the officers encountered the victim she was frightened and upset, the area was unsecured, and the situation they were entering was uncertain. Further, the responding officers were unaware of the nature of the crime, the identity of the alleged assailant, or the medical concerns of the victim. Based on this evidence, the court concluded:

> "[The responding officers] were not producing evidence in anticipation of a potential criminal prosecution in eliciting basic facts from [the victim] about the nature and cause of her injuries. In reaching this conclusion, we do not adopt a blanket rule that all statements obtained from victims or witnesses by police officers

> responding to emergency calls are necessarily nontestimonial. The determination [of] whether a statement obtained through police questioning in the field is testimonial requires a case-specific, fact-based inquiry. Under *Crawford,* this inquiry must center around whether the officer involved was acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution. Here, where the responding officers were still principally in the process of accomplishing the preliminary tasks of securing and assessing the scene, we conclude that the statement elicited is not testimonial." Kilday, 20 Cal. Rptr. 3d at 173-74.

In this case, we similarly find that M.M.'s statement to Officer Harrell at Jackson's house is not testimonial in nature. When the officer arrived at Jackson's house, she did so in response to a "call for help." Upon arriving, Officer Harrell encountered M.M., who she described as crying and having a "look of fear on her." As in Kilday, there is no indication in the record here that Officer Harrell was aware of the nature of the crime, the identity of the alleged assailant, or the medical concerns of the victim. The questions posed by the officer were preliminary in nature and for the purpose of attending to M.M.'s medical concerns, not for the purpose of producing evidence in anticipation of a potential criminal prosecution. Therefore, we find that M.M.'s responses are not testimonial in nature, and that they were properly admitted.

The defendant next contends that all of the statements M.M. made to Sibug and Dr. Labrador are testimonial in nature because they were obtained in

anticipation of a potential criminal prosecution. A similar argument was made to this court in In re T.T., 351 Ill. App. 3d 976, 815 N.E.2d 789 (2004).

In In re T.T., the respondent raised a Crawford challenge to the admission at trial of the victim's hearsay statements to a doctor who had examined her. We held that the victim's statements describing the cause of her symptoms or pain were not testimonial in nature, while those statements to the doctor identifying the respondent as the assailant were testimonial in nature. In re T.T., 351 Ill. App. 3d at 992. In so finding, we reasoned that:

> "A victim's statements to medical personnel regarding 'descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof [citation],' are not testimonial in nature where such statements do not accuse or identify the perpetrator of the assault. [The victim's] statements explaining how she was penetrated, the pain, and the offender's use of a lubricant are relevant in assessing how [the doctor] reached her opinion that [the victim] sustained sexual abuse and are in accord with the statutory hearsay exception for statements, made by a patient with a selfish interest in treatment, for the purpose of medical diagnosis and treatment. Those statements were not accusatory against respondent at the time made and, thus, do not trigger enhanced protection under the confrontation clause." In re T.T., 351 Ill. App. 3d at 993.

We find no reason to deviate from the holding in In re T.T., and similarly find that M.M.'s statements to Sibug and Dr. Labrador regarding the nature of the alleged attack, and the cause of her symptoms and pain remain governed by the medical treatment exception to the hearsay rule (725 ILCS 5/115-13 (West 2002)), and that they were properly admitted at trial. The remainder of M.M.'s statements to Sibug and Dr. Labrador concerning fault or identity, however, "implicate the core concerns protected by the confrontation clause." In re T.T., 351 Ill. App. 3d at 993. Thus, we find that those portions of M.M.'s statements to Sibug and Dr. Labrador which identify the defendant as her assailant are testimonial in nature, and their admission at trial violated the defendant's right of confrontation.

The defendant next contends that the trial court erred in admitting M.M.'s statements to the 911 dispatcher. The defendant claims that the dispatcher was seeking information fashioned to apprehend and prosecute the alleged offenders by posing questions meant to ascertain their physical descriptions, the type of vehicle they fled in, and the direction of their flight. According to the defendant, the dispatcher was interrogating M.M. and, therefore, her responses are testimonial in nature.

Once again, although there are no Illinois cases on point, we are guided by several decisions from other jurisdictions. In People v. Moscat, 777 N.Y.S.2d 875, 879, 3 Misc.3d 739 (N.Y. Crim. Ct. 2004), the court held that the victim's statement on a 911 recording was not testimonial in nature because her call for help was "essentially different in nature than the 'testimonial'

materials that *Crawford* tells us the Confrontation Clause was designed to exclude." In so finding, the court stated that the typically "hurried and panicked" conversation between an injured victim and a dispatcher is simply not equivalent to the formal pretrial examinations to which the confrontation clause was directed. Although those who provide a formal statement, deposition, or affidavit are conscious that they are bearing witness, and that their statement may be used in a potential criminal proceeding, an individual who has just been injured "is not contemplating being a 'witness' in future legal proceedings; she is usually trying simply to save her own life." Moscat, 777 N.Y.S.2d at 879-80. Therefore, the court concluded, because the caller is not "bearing witness," a 911 call is not testimonial in nature, and it may be received in evidence without offending the confrontation clause. Moscat, 777 N.Y.S.2d at 880. See also People v. Caudillo, 19 Cal. Rptr. 3d 574, 122 Cal. App. 4th 1417 (Cal. Ct. App. 2004) (holding that statements contained on a 911 tape did not constitute testimonial evidence).

In reaching a different conclusion, the court in People v. Cortes, 781 N.Y.S.2d 401, 407, 4 Misc.3d 575 (N.Y. Sup. Ct. 2004), held that the questions posed by the 911 dispatcher fell within Crawford's definition of interrogation and, thus, produced a statement which was testimonial in nature. As the court explained:

> "When a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; it

> makes no difference what the caller believes.
> ***
>
> ***
>
> *** An objective reasonable person knows that when he or she reports a crime the statement will be used in an investigation and at proceedings relating to a prosecution." Cortes, 781 N.Y.S.2d at 415.

The Cortes court concluded that the purpose of the 911 call at issue was to invoke "police action and the prosecutorial process" and, therefore, the defendant was entitled to confront the declarant. Cortes, 781 N.Y.S.2d at 416.

Finally, in People v. Powers, 124 Wn. App. 92, 99 P.3d 1262 (Wash. Ct. App. 2004), the court, after examining, *inter alia*, Moscat and Cortes, found that the 911 recording at issue was testimonial in nature. The court first rejected a bright line rule that all 911 recordings were nontestimonial, opting instead to employ a case-by-case analysis into whether the statements contained on the recording originated from interrogation. The court then examined the call and found that it was neither "part of the criminal incident itself," nor a request for help. Rather, the court found that the call was made for the purpose of reporting a criminal violation, and to assist in the apprehension and prosecution of the offender. Accordingly, the statements contained on the 911 recording were held to be testimonial in nature. Powers, 99 P.3d at 1266.

We find Moscat, Cortes and Powers helpful in several respects. First, as in Powers, we reject any bright line rule which would hold a 911 call testimonial or not

testimonial in nature. Rather, we believe that a court should determine, on a case-by-case basis, whether the statement made to the 911 dispatcher was: (1) volunteered for the purpose of initiating police action or criminal prosecution; or (2) provided in response to an interrogation, the purpose of which was to gather evidence for use in a criminal prosecution. In the first instance, the statement is testimonial in nature because an objective individual would reasonably believe that when he or she reports a crime they are "bearing witness" and that their statement will be available for use at future criminal proceedings. Cortes, 781 N.Y.S.2d at 415-16. In the later case, the statement is testimonial in nature because it is the product of evidence-producing questions, the responses to which, if used to convict a defendant, would implicate the central concerns underlying the confrontation clause. Crawford, 541 U.S. at 52-53, 124 S.Ct. at 1365. Second, in performing this analysis, a court should examine a caller's statement in the same manner as it would a victim's statement to a treating medical professional. Accordingly, statements which are made "to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation" (Richard Friedman, Bridget McCormack, *Dial In Testimony*, 150 U. Pa. L. Rev. 1171, 1242 (2002)) are comparable to those made to medical personnel regarding "descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof" (725 ILCS 5/115-13 (West 2002)) and, as such, are not testimonial in nature. However, statements volunteered for the purpose of "invoking police action and the prosecutorial process" (Cortes, 781 N.Y.S.2d at 416), or responses to questions posed for

the purpose of collecting information "useful to the criminal justice system," (150 U. Pa. L. Rev. at 1242) are testimonial in nature.

Applying these principles to the matter at hand, we find that those statements made to the 911 dispatcher concerning the nature of the alleged attack, M.M.'s medical needs, and her age and location are not testimonial in nature, and were properly admitted at trial. These statements were given immediately after M.M. was brutally assaulted and in a state of shock for the purpose of requesting medical and police assistance. Further, the dispatcher's questions concerning what was wrong, whether M.M. was in need of an ambulance, what her age was, and where she was located were posed in order to gather information about the situation and to secure medical attention for her, not to produce evidence in anticipation of a potential criminal prosecution. However, those statements made by M.M which described her vehicle, the direction in which her assailants fled, and the items of personal property they took are testimonial in nature. These statements were made in response to questions posed by the dispatcher for the stated purpose of involving the police. As such, M.M.'s responses are comparable to those obtained through official questioning for the purpose of producing evidence in anticipation of a potential criminal proceeding, and their use at trial to secure the defendant's conviction implicates the central concerns underlying the confrontation clause. Crawford, 541 U.S. at 52-53, 124 S.Ct. at 1365. Accordingly, we find that the portion of M.M.'s statement to the dispatcher which described her vehicle, the direction in which her assailants fled, and the items of personal property they took are

testimonial in nature, and their admission at trial violated the defendant's right of confrontation.

Finally, the defendant contends that the statements M.M. made to Jackson, "with the exception of the immediate outcry of 'Help me, I've been raped'" are testimonial in nature. The defendant argues that M.M.'s statements to Jackson were "indirectly made to a police or government official." We disagree.

Here, the defendant attempts to characterize Jackson as an agent of the government because she acted as an intermediary between M.M. and the 911 dispatcher. We believe, however, that Jackson was no more than a concerned citizen, and that her actions in relaying information to the 911 dispatcher do not transform her into an agent of the government. When M.M. appeared at Jackson's door, she was crying for help. Jackson took M.M. into her home and asked her what had happened. The purpose behind Jackson's questions was clearly altruistic and, as such, we fail to see how she was acting as a governmental officer seeking evidence in anticipation of a potential criminal prosecution. Thus, we find that M.M.'s statements to Jackson do not implicate the central concerns underlying the confrontation clause and, accordingly, are not testimonial in nature. They were therefore properly admitted at the defendant's trial. Having found several violations of the defendant's right of confrontation, we must now determine if they were harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). In People v. Wilkerson, 87 Ill. 2d 151, 156, 429 N.E.2d 526 (1981), our supreme court set forth three approaches for measuring harmless error: (1) focusing on the error to determine whether it

might have contributed to the conviction; (2) examining the other evidence in the case to see if overwhelming evidence supports the conviction; and (3) determining whether the evidence is cumulative or merely duplicates properly admitted evidence. Here, Officers Harrell and Kane and Detective McInerney testified in great detail concerning the numerous statements M.M. made at the hospital following her attack. These statements described the nature of her ordeal, identified the defendant as one of her assailants, and detailed the acts he performed. Although the physical evidence, testimony of Jackson, and M.M.'s statements to Officer Harrell at Jackson's house provided evidence of the defendant's involvement in the commission of the various offenses, M.M.'s statements to Officers Harrell and Kane and Detective McInerney at the hospital identified with the most specificity the acts the defendant performed. We believe there is a reasonable probability that the admission of these statements contributed to the defendant's convictions. Thus, we conclude that the confrontation clause errors in this case were not harmless beyond a reasonable doubt. Accordingly, we reverse the defendant's convictions and sentences and remand the case to the circuit court for a new trial. In so doing, we find that the evidence was sufficient to support the defendant's convictions, so that double jeopardy considerations do not prevent retrial. People v. Olivera, 164 Ill. 2d 382, 393, 647 N.E.2d 926 (1995). Due to our resolution of this issue, we find it unnecessary to address the defendant's alternative hearsay argument. However, we shall address the defendant's sentencing issue as it is likely to arise on retrial.

The defendant argues that the trial court erred by allowing two State witnesses to present hearsay evidence of several prior bad acts. We disagree.

A trial court is not bound by the same rules of evidence at a sentencing hearing as it is during the guilt phase of a trial. People v. Bilski, 333 Ill. App. 3d 808, 818, 776 N.E.2d 882 (2002). For example, hearsay evidence is admissible so long as it is relevant and reliable. Bilski, 333 Ill. App. 3d at 818.

In this case, the State presented the testimony of a corrections officer and a Chicago police detective who had conducted investigations into the defendant's alleged commission of several criminal acts. The corrections officer described the defendant's alleged involvement in two fights which occurred during his pre-trial detention. The officer's testimony was based on statements he received during his investigation from other officers and the victim of one of the fights. The detective testified concerning an investigation she conducted in 1995 into the alleged assault of a 13 -year-old girl. The detective stated that the alleged victim told her the defendant had used a screwdriver to stab her and tear off her clothing, and that after the defendant was arrested he struck his arresting officers and escaped.

We find that evidence of the defendant's prior bad acts was properly admitted. First, the evidence is relevant to the sentencing phase because it related to the defendant's criminal history and provided insight into his character. People v. Ivy, 313 Ill. App. 3d 1011, 1019, 730 N.E.2d 628 (2000). Further, the evidence is reliable because it was based on an official investiga-

tion into the defendant's alleged involvement in a criminal offense. People v. Morgan, 112 Ill. 2d 111, 144, 492 N.E.2d 1303 (1986).

Therefore, we find that the testimony of the corrections officer and detective presented at the defendant's sentencing hearing was properly admitted.

For the foregoing reasons, we reverse the defendant's convictions and sentences and remand the cause to the circuit court for a new trial.

Reversed and remanded.

KARNEZIS, P.J., and SOUTH, J., concur.

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, IL 62706

May 31, 2007

Ms. Susan R. Schierl Sullivan
Assistant State's Attorney
309 Richard J. Daley Center
Chicago, IL 60602

No. 100065 – People State of Illinois, petitioner, v. Marcus West, respondent. Leave to Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on July 6, 2007.

No. 100065

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal, Appellate Court
Petitioner,	)	First District
v.	)	AC1-02-2358
MARCUS WEST,	)	Circuit Court of Cook County
Respondent.	)	Hon. Stuart E. Palmer, Judge Presiding.

ORDER

This cause coming to be heard on the motion of the petitioner, an objection having been filed by the respondent, and the court being fully advised in the premises;

IT IS ORDERED that the motion for leave to file a motion for reconsideration of the order of May 31, 2007, denying the petition for leave to appeal is denied. The motion for supervisory order also is denied.

Order entered by the Court.

FILED

Jul 12 2007

SUPREME COURT CLERK

No. 100065

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner,	)	Appeal, Appellate Court First District
v.	)	No. 1-02-2358
MARCUS WEST, Respondent.	)	Circuit Court of Cook County No. 98 CR 10120 Hon. Stuart E. Palmer Judge Presiding.

MOTION TO RECONSIDER DENIAL OF PETITION FOR LEAVE TO APPEAL OR, IN THE ALTERNATIVE, TO ENTER A SUPERVISORY ORDER REMANDING THE MATTER TO THE APPELLATE COURT FOR RECONSIDERATION IN LIGHT OF DAVIS V. WASHINGTON, 126 S.CT. 226, 165 L.ED.2D 224 (2006) AND/OR PEOPLE V. STECHLY, 2007 ILL LEXIS 452 (2007)

The People of the State of Illinois, by their Attorney, RICHARD A. DEVINE, State's Attorney of Cook County, Illinois, and LISA MADIGAN, Attorney General of Illinois, through ASHLEY ROMITO and SUSAN R. SCHIERL SULLIVAN, Assistant State's

Attorneys, respectfully request that this Honorable Court reconsider its denial of the People's Petition for Leave to Appeal or, in the alternative, enter a Supervisory Order remanding the matter to the Appellate Court for reconsideration in light of Davis v. Washington, 126 S.Ct. 226, 165 L.Ed.2d 224 (2006) and/or People v. Stechly, 2007 Ill. Lexis 452 (2007). The People state the following in support of their Motion.

1. Defendant was convicted of five counts of aggravated criminal sexual assault, and one count each of aggravated vehicular hijacking, armed robbery and kidnapping.

2. On January 5, 2005, in a published opinion, the Appellate Court First District, Third Division, reversed defendant's convictions, on confrontation clause grounds, and remanded the cause for a new trial. People v. West, 355 Ill.App.3d 28, 823 N.E.2d 82 (2005). On May 31, 2007, this Court denied the People's Petition for Leave to Appeal this decision, which challenged the Appellate Court's determinations regarding three statements of the victim to police officers, a 911 call by the victim, and two statements the victim made to an emergency room nurse and doctor.

3. The Appellate Court premised the test that it formulated to assess the constitutionality of these various statements upon the recently released landmark decision by the United State Supreme Court of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), which was handed down on March 8, 2004. With Crawford, the United States Supreme Court entirely reordered the Confrontation Clause para-

digm such that, post-Crawford, the Clause's protective reach only extended to "testimonial" out of court statements. Only with the utterance of a "testimonial" hearsay statement is the declarant acting as the constitutionally-requisite "witness against" the "accused" under the Clause.

4. While Crawford declined to give a "comprehensive definition" of what constitutes a "testimonial" statement (Crawford, 541 U.S. at 68), it assured us that "[s]tatements taken by police officers in the course of interrogations," "qualify under any definition" of "testimonial." Crawford, 541 U.S. at 52.

5. Thus, courts across the nation took Crawford at its word. While courts, admittedly, devised a wide range of tests by which to identify a "police interrogation," once a "police interrogation" was identified, the inquiry was at an end. As far as anyone could tell, pursuant to Crawford, a "police interrogation" would necessarily produce a "testimonial" statement protected by the Confrontation Clause.

6. The instant Appellate Court, too, fell prey to this, explicitly stating, "Although Crawford failed to precisely define testimonial evidence, the Court was clear in at least one respect: statements taken by police officers in the course of an interrogation are considered testimonial 'under even a narrow standard.' Crawford, 541 U.S. at 50, 124 S.Ct. at 1364." West, 355 Ill.App.3d at 35. This analytical framework formed the very foundation upon which the Appellate Court premised its ultimate determinations regarding the three statements made by the victim to the police and the 911 call made by the victim.

7. Post-Crawford, moreover, the dispute among courts nationwide was extremely contentious with respect to the matter of 911 calls, particularly where the 911 operator asks the caller a series of questions, generating a mix of responses from the caller, as occurred in the instant case. The battle, however, was waged in the realm of whether or not the series of questions were "interrogation-type questions" or not. If they were, they were "testimonial" and, if not, they were "nontestimonial" according to the authority of Crawford.

8. Again, the instant Appellate Court was influenced by its understanding of the treatment "police interrogations" received under Crawford. Defendant contended that "the dispatcher was interrogating M.M. [the victim and 911 caller] and, therefore, her responses are testimonial in nature"(West, 355 Ill.App.3d at 38) and the Appellate Court's discussion largely sought to assess which components of the 911 call were "interrogation-like" and which were not, resulting in content-driven scrutiny of the component parts of the 911 call. West, 355 Ill.App.3d at 38-40.

9. The Appellate Court relied upon four cases from other jurisdictions for guidance: People v. Moscat, 3 Misc. 3d 739, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004); People v. Caudillo, 19 Cal.Rptr.3d 574, 122 Cal. App. 4th 1417 (Cal. Ct. App. 2004); People v. Codes, 4 Misc. 3d 575, 781 N.Y.S.2d 401, 407 (N.Y. Sup. Ct. 2004); and People v. Powers, 124 Wn. App. 92, 99 P.3d 1262 (Wash. Ct. App. 2004). See West, 355 Ill.App.3d at 38-40. Every one of these four cases was, in turn, discussed in a decision by the Indiana Supreme Court. Hammon v. Indiana, 829 N.E.2d 444, 454-456, 2005 Ind. Lexis 541 (Ind. 2005).

10. The Appellate Court's decision, the four cases it relied upon for guidance, and the synthesizing decision of Hammon v. Indiana, all pre-dated the United States Supreme Court's decision in Davis v. Washington, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) and were, therefore, premised upon Crawford alone. Importantly, the Petition for Leave to Appeal also took its lead from Crawford and its signal that the battle lines were drawn around whether or not a "police interrogation" was at issue.

11. In the interim, however, while the People's Petition for Leave to Appeal was pending, the United States Supreme Court granted *certiorari* (along with a companion case, State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (Wash. 2005)) in Hammon v. Indiana—the decision upon which the cited authorities in the instant cause relied. Davis v. Washington, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Hammon was ultimately reversed by the United States Supreme Court, which alone calls into question the Appellate Court decision in the instant case.

12. With Davis v. Washington, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the High Court handed down the first of its Crawford progeny in which, as this Court itself has acknowledged, "the Court recognized that not all police interrogations were for the purposes of gathering information for prosecution, however, and modified the broad rule it announced in Crawford." People v. Stechly, 2007 Ill. Lexis 452, *58-59.

13. The question of whether or not a "police interrogation" took place is no longer the stopping off point of analysis, as Crawford seemingly taught. Davis has now

"recognized that not all police interrogations were for the purposes of gathering information for prosecution" as this Court itself has recognized. Stechly, 2007 Ill. Lexis 452, * 58-59.

14. Pursuant to Davis, statements made during "police interrogation" are to be evaluated as follows:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis, 126 S.Ct. at 2273-2274.

15. The Appellate Court's determinations that three statements made by the victim to police officers, at various stages of the incident, and portions of the 911 call by the victim were "testimonial," were premised solely upon the tutelage of Crawford. With Davis, however, the analysis takes on a seismic shift from whether or not a "police interrogation" was taking place, to the question of the primary purpose of the "interrogation" and the "ongoing emergency" verses "past events" timing of the statements themselves.

16. The People submit that, under the proper analysis, the Appellate Court's determinations with respect to these three statements of the victim to the police officers and the selected portions of the 911 call were "nontestimonial."

17. Unfortunately, the Davis v. Washington analysis, acknowledged by this Court to be a "clarification or modification" of Crawford, has been completely omitted from the analysis at all levels of this cause—trial court, Appellate Court and, now, in this Court's determination regarding the People's Petition for Leave to Appeal. For this reason alone, the People request an opportunity to have this Court reconsider its decision to deny the Petition for Leave to Appeal or, in the alternative, enter a Supervisory Order remanding the matter to the Appellate Court for reconsideration in light of Davis v. Washington, 126 S.Ct. 226, 165 L.Ed.2d 224 (2006).

18. Additionally, the Appellate Court made an erroneous determination regarding two statements to an emergency room nurse and doctor by the victim without the benefit of this Court's subsequent decision in People v. Stechly, 2007 Ill. Lexis 452 (2007).

19. In Stechly, with the benefit of Davis, this Court found that statements made outside of the context of "police interrogations," as these two statements clearly were, are governed by the following test: "Would the objective circumstances have led a reasonable person to conclude that their statement could be used against the defendant." Stechly, 2007 Ill. Lexis 452, *67. The inquiry is "whether the objective circumstances indicate that a reasonable person in the declarant's position would have anticipated that his statement likely would be used in prosecution." Stechly, 2007 Ill. Lexis 452, *73. Finally, Stechly teaches that the objective circumstances include the specific objective circumstances of the declarant, such as the age of the child. Stechly, 2007 Ill. Lexis 452,

*73-79. Applying this principle to the case at bar, the medical/emotional condition of the instant victim, objectively viewed, should factor into the analysis, but was not.

20. The Appellate Court, moreover, premised its decision to select out content-based portions of these two medical statements as "testimonial" largely upon the authority of In re T.T., 351 Ill.App.3d 976, 815 N.E.2d 789 (1st Dist. 2004), a decision this Court has directed the Appellate Court to vacate and to reconsider in light of Stechly as it pertains to the State's claim of forfeiture by wrongdoing. In re T.T., No. 99227, Supervisory Order, entered May 31, 2007. See West, 355 Ill.App.3d at 37-38.

21. For these reasons, too, the Appellate Court's determination regarding the two statements made by the victim to the emergency room nurse and doctor rest upon a now out-dated understanding of Crawford. Thus, in addition to the arguments made above with respect to Davis, this Court should reconsider its denial of the People's Petition for Leave to Appeal or, in the alternative, enter a Supervisory Order remanding the matter to the Appellate Court for reconsideration in light of People v. Stechly, 2007 Ill. Lexis 452 (2007), as well.

22. In the alternative, the Court should hold this case for In re Rolandis G., No. 99581. On May 31, 2007, this Court allowed Leave to Appeal in Rolandis G. In that case, the Appellate Court held that a child victim's statements to a police officer and to a child advocacy worker were "testimonial" while the statements to the victim's mother were "nontestimonial" under Crawford.

To the extent that this Court's decision in this case will provide further guidance about the meaning of "testimonial" for Confrontation Clause purposes, this Court should vacate the denial of the Petition for Leave to Appeal in the present case and hold this case until Rolandis G. is resolved.

23. As it stands, following denial of the People's Petition for Leave to Appeal in this matter, the Appellate Court's published decision in West remains viable as legal authority in Illinois. As such, the West decision controls the circuit courts in Cook County, as well as all other circuit courts insofar as the relevant appellate court district has not taken a different approach than West. Given that the West decision, now untouched, potentially conflicts with this Court's opinion in Stechly and the United State's Supreme Court's opinion in Davis, the People submit that action by this Court is not only warranted, but absolutely necessary to lend appropriate guidance to lower courts and to prevent resulting confusion.

THEREFORE, the People of the State of Illinois respectfully request that this Court reconsider its denial of the People's Petition for Leave to Appeal or, in the alternative, enter a Supervisory Order remanding the matter to the Appellate Court for reconsideration in light of Davis v. Washington, 126 S.Ct. 226, 165 L.Ed.2d 224 (2006) and/or People v. Stechly, 2007 Ill. Lexis 452 (2007) or hold this case in abeyance for In re Rolandis G., No. 99581 (PLA allowed May 31, 2007).

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